



Proposed Regulation Agency Background Document

Agency name	Department of Professional and Occupational Regulation
Virginia Administrative Code (VAC) citation	18 VAC 120-30
Regulation title	Regulations Governing Polygraph Examiners
Action title	Amending
Document preparation date	May 10, 2005

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 21 (2002) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

In a short paragraph, please summarize all substantive changes that are being proposed in this regulatory action.

The regulation of polygraph examiners in the Commonwealth of Virginia began with the statutory creation of a licensing program in 1975. Since that time the regulations have evolved to include the establishment of an advisory board, implementation of an intern program for potential licensees and the adoption of standards of practice and conduct that ensure that polygraph examinations are done fairly and ethically. During this time frame the equipment and technology available to polygraph examiners has changed tremendously, especially in the last few years, as have techniques used to interview examinees. Because of these and other factors the Department of Professional and Occupational Regulation (DPOR) must amend these regulations to ensure that they are applicable to current practices and meet the intent of the statutes. The proposed amendments address some of these changes, clarify existing regulations and delete unnecessary regulations.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

§ 54.1-1802 requires that the Director of the Department of Professional and Occupational Regulation “promulgate regulations that are not inconsistent with the laws of Virginia necessary to carry out the provisions of [Chapter 18 of Title 54.1 of the Code of Virginia] and Chapter 1 (§ 54.1-100 et seq.).”

18 VAC 120-30-30 provides the authority for the Director of the Department of Professional and Occupational Regulation to appoint a Board to advise the Department on any matters relating to the practice or licensure of polygraph examiners.

Purpose

Please explain the need for the new or amended regulation by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal and the problems the proposal is intended to solve.

DPOR seeks to amend the current Regulations Governing Polygraph Examiners in order to remove redundant information, correct referenced citations, clarify language and modify licensing requirements. The clarifications and corrections are essential to the protection of the health, safety and welfare of citizens, as regulations that are incorrect or that cite incorrect references are confusing to the regulants and can lead to errors in examination procedures and protocols. The proposed regulations have been developed to reduce confusion and subjective interpretations of the regulations by both the licensees and the general public.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (More detail about these changes is requested in the “Detail of changes” section.)

The majority of changes are cosmetic in that they remove sections that are duplicated in statute or elsewhere in the regulations. These “administrative” changes serve to clean-up the regulations and reduce the chances of non-compliance with other relevant sources (statutory or otherwise) that are subject to periodic amendments; most of these changes are found in the definitions.

A large portion of the regulation has been moved to a more appropriate section, making it less confusing and easier to reference. The section that currently provides training and education requirements for licensure, applicable primarily to interns, has been moved from the general qualifications section into the section listing eligibility criteria for interns. An additional portion

of the general qualifications that provided eligibility criteria for polygraph examiners was moved into the more appropriate section dealing specifically with that license.

The dishonored check fee was removed from the fee schedule in order to be more in compliance with the regulations of other programs housed at DPOR. It has been determined, through the regulatory review process of other programs, that the dishonored check fee is an administrative fee set by the agency that encompasses all regulatory programs and is based on actual fees charged by financial institutions utilized by the agency. As an agency administration fee, it has been determined that this item should not be listed within the regulations of a specific board.

The requirement that an applicant must submit fingerprint cards along with the application has been amended to require the submission of the applicant's Central Criminal Records Exchange report (available from the Virginia State Police) in lieu of the fingerprint cards. For several months DPOR has not been able to submit fingerprint cards for processing as the State Police notified the Agency that they would be unable to continue to provide this service for programs that did not have the statutory requirement to fingerprint applicants. The agency determined that a search of the criminal data base, part of the fingerprint card processing procedures, would be sufficient to determine if an applicant has a past criminal history or arrest record.

Other changes provide clarifying language to sections that were confusing as currently written and to change referenced citations

Issues

Please identify the issues associated with the proposed regulatory action, including:

- 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
- 2) the primary advantages and disadvantages to the agency or the Commonwealth; and*
- 3) other pertinent matters of interest to the regulated community, government officials, and the public.*

If the regulatory action poses no disadvantages to the public or the Commonwealth, please so indicate.

1) In amending these regulations the Department, with the technical expertise of the Polygraph Examiners Advisory Board, reviewed current regulations, amendments to the statutes, current Federal polygraph law and weighed them along with the protection to the public and the burden to the regulant population. Many of these amendments were the direct result of feedback received from applicants as well as input from the licensing staff, who provided anecdotal data of difficulties in processing applications and interaction with the applicant as a result of those difficulties. As a result the Board moved sections of the regulations pertaining to the eligibility requirements for licensure into an order that should alleviate some confusion and make them easier to understand. There is no perceived disadvantage to changing the regulations to make them easier to understand.

Other amendments submitted with this proposal change the requirements for instructors at polygraph schools and for the schools themselves. This proposal will allow more instructors to meet the qualifications to teach, expanding the pool of available instructors. Additional changes require schools to report changes in any of the provisions that qualify them as approved schools and allow the Department to periodically review a school’s qualifications. Both of these proposals would be advantageous, in that they would increase the number of available instructors for certain classes, yet would give the Department the authority to requalify schools, ensuring that those offering training for licensure maintain their qualifications at all times.

- 2) This program directly affects a small number of regulants (less than 300) and it is not anticipated that this population will change significantly as a result of these regulatory amendments. The anticipated changes should be an advantage to the licensing staff since the clarifications should lead to a decrease in telephone calls from applicants trying to understand the eligibility criteria, resulting in more time to process applications, lowering the processing time.
- 3) There were no other items are identified that would be considered pertinent matters of interest to the regulated community, government officials or the public.

Economic impact

Please identify the anticipated economic impact of the proposed regulation.

Polygraph Board

Fiscal Impact of Proposed Regulation

These regulatory changes provide clarification and consistency with Federal requirements, and require new applicants for a Polygraph license to submit a Central Criminal Records Exchange (CCRE) report. There is no impact on the board’s funding, revenues, or expenditures as a result of these changes.

All costs incurred in support of board activities and regulatory operations are paid by the department and funded through fees paid by applicants and licensees. All boards within the Department of Professional and Occupational Regulation must operate within the Code provisions of the Callahan Act (54.1-113), and the general provisions of 54.1-201. Each regulatory program's revenues must be adequate to support both its direct costs and a proportional share of agency operating costs. The department allocates costs to its regulatory programs based on consistent, equitable, and cost-effective methodologies.

Fiscal Impact:

	FY 2006	FY 2007	FY2008	FY2009
Fund / fund detail	NGF (0900)	NGF (0900)	NGF (0900)	NGF (0900)
Program/Subprogram	560 44	560 44	560 44	560 44

Impact of Regulatory Changes:

One-Time Costs	0	0	0	0
Ongoing Costs	0	0	0	0
Total Fiscal Impact	0	0	0	0
FTE	0.00	0.00	0.00	0.00

Description of Costs:

One-Time: There are no one-time costs associated with the proposed regulations.

Ongoing: There are no ongoing costs associated with the proposed regulations.

Cost to Localities: Localities who pay the licensing fees for employees applying for a polygraph license could incur the additional \$15 cost for the CCRE. Based on historical data, the additional cost is not anticipated to be more than \$100 annually per locality.

Description of Individuals, Businesses, or Other Entities Impacted: Polygraph examiners in Virginia who perform pre-employment examinations as well as examinations as part of a criminal investigation.

Estimated Number of Regulators: There are currently 254 licensed polygraph examiners and 22 licensed interns. Fewer than 25 new applicants are expected annually.

Projected Cost to Regulators: No change is expected in the Department’s licensing fees as a result of these regulations. If fees are not paid by their employers, new applicants will incur an additional \$15 cost for the CCRE required as a part of these regulatory changes. The additional cost to become licensed is not considered prohibitive for entry into the profession.

Financial Status and Projections Board for Polygraph Examiners

Number of Regulators 276

	<u>2000-2002</u>	<u>2002-2004</u>	<u>2004-2006</u>	<u>2006-2008</u>	<u>2008-2010</u>
Beginning Cash Balance	31,259	32,557	27,210	-4,767	-23,614
Revenue	14,135	10,950	10,653	10,802	10,953
Expenditures:					
Board Expenditures	4,644	4,603	23,880	8,374	9,379

Board Administration	1,786	3,694	5,923	6,720	7,527
Examinations	2,441	3,080	4,938	5,603	6,276
Enforcement	12	7	11	13	14
Legal Services	391	1,248	2,001	2,270	2,543
Information Systems	1,084	824	1,321	1,499	1,679
Facilities/ Support Services	1,422	1,425	2,285	2,592	2,904
Agency Administration	1,029	1,109	1,778	2,018	2,260
Transfers/Other	28	307	492	559	626
Total Expenditures	12,837	16,297	42,630	29,649	33,207
Cash Balance	32,557	27,210	-4,767	-23,614	-45,868
Callahan Percentage	<u>253.6%</u>	<u>167.0%</u>	<u>-11.2%</u>	<u>-79.6%</u>	<u>-138.1%</u>

NOTES:

Projected board expenditures include a one-time expenditure of \$16,500 in the 2004-06 biennium for examination development.
 Fee increases have been proposed to the Board based on the projected deficit, but are not part of this regulatory action.

Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action.

Many of these proposed amendments resulted from a review of current regulations that determined specific modifications to improve comprehension and thus, ensure regulant compliance. Increased visibility of polygraph examiners as a result of the emphasis being placed on homeland security and the reentry of convicted felons into the public sector has made it imperative that individuals who perform polygraph examinations are adequately qualified and maintain an appropriate standard of practice and conduct. At this time, no additional alternatives have been established or explored, however, it is likely that many alternatives will be presented during the public comment periods.

Public comment

Please summarize all comments received during public comment period following the publication of the NOIRA, and provide the agency response.

No comment was received during the public comment period following the publication of the NOIRA.

Family impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability.

These amendments will have no impact on the institution of the family or family stability.

Detail of changes

Please detail all changes that are being proposed and the consequences of the proposed changes. Detail all new provisions and/or all changes to existing sections.

If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all changes between the pre-emergency regulation and the proposed regulation, and (2) only changes made since the publication of the emergency regulation.

For changes to existing regulations, use this chart:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
18 VAC 120-30-10		Definition of "affidavit"	Removes the definition from the regulations in order to facilitate the acceptance of applications from the DPOR website.
		Definition of "Department"	Removes the definition from the regulations as it is contained in the statutes.
		Definition of "Director"	Removes the definition from the regulations as it is currently contained in the statutes.
		Definition of "Polygraph"	Removes the definition from the regulations as it is currently contained in the statutes.
		Definition of "Polygraph examiner"	Removes the definition from the regulations as it is currently contained in the statutes.
		Definition of "Polygraph examiner intern"	Removes the definition from the regulations as it is currently contained in the statutes.
18 VAC 120-30-30		Advisory Board	Adds language to paragraph A that clarifies the authority of the Polygraph Examiners Advisory Board, consistent with statutory authority found in Title 2.2 of the Code of Virginia.
18 VAC 120-30-		Basic Qualifications	Paragraph A: removes existing sub-paragraphs 2 - 4, renumbers sub-paragraphs 5 – 10, and amends

40			<p>sub-paragraphs 9 & 10.</p> <p>Sub-paragraphs 2-4 were removed and placed, in substance, within another more appropriate section of the regulations. Confusion arising from applicants as to whether or not the educational requirements pertained to all applicants, interns, individuals seeking reciprocity, etc., resulted in the Board reviewing the current structure of the Entry Requirements section of the regulations. It was determined that by moving the provisions of current paragraphs 2-4 to the section of the regulations that provides for polygraph examiner interns, individuals applying for a license will find the regulations easier to understand and less of a burden when applying for licensure.</p> <p>Sub-paragraph 9 (proposed 6) is amended to remove the reference to "affidavit" in order to be consistent with the proposed amendment to the definitions.</p> <p>Sub-paragraph 10 (proposed 7) is amended to remove the requirements that applicants provide finger-print cards as part of the application and replaces it with a current (within 30 days) history record from the Central Criminal Records Exchange (CCRE). This regulations is proposed as a result of the Department's difficulty in getting finger-print cards processed due to workload and policy issues. Since July 2003, the Department has accepted CCRE reports from applicants for polygraph licenses due to difficulty in obtaining finger-print records. This proposed change takes that procedure and places it in the regulations.</p> <p>Paragraph B: Removes language providing that applicants who do not respond to requests for additional information within 30 days of that request may have their license disapproved.</p> <p>This language is being removed in order to comply with current records retention policy that provides that applications be held for one year.</p>
18 VAC 120-30-50		Polygraph Examiner Intern Registration	<p>Paragraph A is amended to add language previously located in 18 VAC 50-30-40 that is moved to this section in order to clarify the eligibility requirements for licensure as an intern.</p> <p>Paragraph B is amended to correct references to regulations, required due to proposed amendments.</p>
	18 VAC 120-30-55	Qualifications for licensure by examination.	This newly proposed section of the regulations provides for those individuals wanting to obtain a license by examination. Paragraph A includes

			language from 18 VAC 50-30-40 that has been moved to this new section in order to clarify the eligibility requirements for licensure. Paragraph B provides that the individual must submit a completed application and fee in order to be considered for the exam and that passing that exam will result in issuance of the license.
18 VAC 120-30-90		Waiver of internship requirement	Corrects language that states “board’s” to “department’s”
18 VAC 120-30-100		Fees.	<p>Paragraphs C & D remove the dishonored check fee from the regulations. The removal of the dishonored check fee from the regulations is in response to the determination by DPOR that the fee is one that should be set by the Agency as a result of the cost of processing dishonored checks. Since this fee is an administration fee not a licensing fee, it should not be in the regulations of a specific Board.</p> <p>The fee chart includes the addition of the fee for application by reciprocity. This fee has been made as a separate entry in order to provide clarification to individual applicants. While those individuals have always paid a licensing fee they were confused as to which category they would be included. This proposal addresses that issue and should alleviate that burden.</p>
18 VAC 50-30-150		Department discretion to deny renewal	Amends statutory reference to the Administrative Process Act to the correct statute.
18 VAC 120-30-160		Qualifications for renewal	Amends regulatory references required by these proposed regulations.
18 VAC 120-130-180		Department discretion to deny reinstatement.	Removes language referencing statutory entitlements under the Administrative Process Act. The Administrative Process Act itself, already requires disclosure to applicants by the Department and in order to reduce confusion that could result from statutory changes, should not be duplicated in the regulations.
18 VAC 120-30-190		Status of license	Added “expiration” to paragraph A in order to clarify reinstatement.
18 VAC 120-30-200		Polygraph examination procedures	Clarifying language added to paragraph C.
18 VAC 120-30-220		Examination standards of practice	<p>Paragraph A is amended to clarify the intent of the standards or practice for the polygraph examination which includes disclosure of these provisions to the examinee.</p> <p>Paragraph B was renumbered as sub-paragraph 6 of paragraph A in order to provide continuity of</p>

			<p>these provisions.</p> <p>Paragraphs C-H were renumbered in order to incorporate the changes in paragraph B</p>
18 VAC 120-30-240		Grounds for fines	<p>Statutory reference in paragraph 2 was amended to reflect changes in Code.</p> <p>Paragraph 8 was added in order to make it a violation of the regulations, subject to sanction, if a polygraph examiner fails to follow the examination standards of practice outlined in 18 VAC 120-30-220.</p>
18 VAC 120-30-270		Minimum requirements for school curriculum	Clarifying language added to paragraph B and item 7 of paragraph B.
18 VAC 120-30-280		Instructor minimum requirements.	<p>Paragraph A, sub-paragraph 1 amended to required that the instructor of “Legal Aspects of Polygraph Examination” be licensed as an attorney in a state or jurisdiction of the United States. This amends current language that required that the instructor be a member of the Virginia State Bar. This was burdensome to polygraph schools located outside the Commonwealth of Virginia and was determined to be an unnecessary burden, since the vast majority of the legal aspects are actually set forth in Federal Law, not individual state law.</p> <p>Paragraph A, sub-paragraph 5 amends language that would now require instructors of other course not specifically listed in this section, have at least five years experience as a polygraph examiner. This amendment ensures that instructors have adequate experience in the nuances of the complicated process of the polygraph examination to be able to articulate, from experience, sufficient information to the students, that will equate to a level of competency allowing the potential licensee to achieve a skill level conducive to the requirements of the examination.</p>
	18 VAC 120-30-290	Amendments and changes	This proposed regulation requires that approved polygraph schools report any changes in the information provided by the school in accordance with 18 VAC 120-30-260; 18 VAC 120-30-270; 18 VAC 120-30-280, within 30 days of the change.
	18 VAC 120-30-300		This proposed regulation provides that approved polygraph schools may be subject to requalification and that the Department has the authority to ask for evidence that a school is complying with the provisions set forth in the regulations.
	18 VAC 120-30-310	Grounds for withdrawing approval from a school	This proposed regulation provides that the Department has the authority to withdraw approval from a polygraph school for a) failure to teach the curriculum as provided; b) using an individual to teach that does not meet the requirements set forth in 18 VAC 120-30-280; and c) if the owner, employee or teacher is guilty of dishonest conduct

			in the teaching of polygraphy.
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